

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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MANCHESTER MUNICIPAL EMPLOYEES,	:	
Local 298, American Federation	:	
of State, County and Municipal	:	CASE NO. <u>A-0450</u>
Employees, AFL-CIO	:	
	:	DECISION NO. <u>79017</u>
v.	:	
	:	
City of Manchester	:	
_____	:	

APPEARANCES

Representing the Manchester Municipal Employees, Local 298:

James J. Barry, Jr., Esquire, Counsel
James Anderson, President

Representing the City of Manchester:

Thomas Clark, Assistant City Solicitor, Counsel
Wilbur L. Jenkins, City Personnel Director

BACKGROUND

An unfair labor practice complaint was brought by the Manchester Municipal Employees against the City of Manchester and was received by the Public Employee Labor Relations Board on March 19, 1979. The complaint alleged that certain employees of the City of Manchester who were not union members but were included under the provisions of a collective bargaining agreement between the city and the union had received unilateral pay increases on or about March 1, 1979 and that the same increase was not granted to union members. It was alleged that this is an unfair labor practice since all of the employees, union and non-union are in the same bargaining units in the City of Manchester and subject to the same contract. In addition, it was alleged that certain city employees not in units represented by the union but occupying jobs similar to those held by union members covered by contracts had received the 7.6 percent wage increase and that this was a disproportionate increase to those pay increases received by bargaining unit employees. It was alleged that the 7.6 percent increase was so inimical to good labor relations and so inherently destructive of union representation as to constitute a per se violation of RSA 273-A as an attempt by an employer to discourage and discriminate against union membership.

Subsequent to the filing of the unfair labor practice complaint, the Public Employee Labor Relations Board decided Case No. 79008 on May 11, 1979. That decision held that all employees in the bargaining units in question, union and non-union, were covered by the contracts, represented by the union, and should receive the same pay and benefits. This resolved a long standing question as to unit composition.

A hearing was held by the Public Employee Labor Relations Board on the unfair labor practice complaint on June 27, 1979 at the Board's office in Concord. At the hearing, evidence was provided that due to the prior decision (79008) the city was bringing pay and benefits of all bargaining unit employees into line, effective July 2, 1979. The issue before the Board was, therefore, narrowed to the question of whether the action by the city in granting raises to non-bargaining unit employees occupying similar jobs to bargaining unit employees in an allegedly higher amount than those benefits negotiated for the bargaining unit employees is an unfair labor practice.

FINDINGS OF FACT
AND RULINGS OF LAW

The Board finds that the portion of the unfair labor practice complaint concerning members of the bargaining unit receiving disproportionate pay has become moot because of the action of the city. It is the Board's understanding that all bargaining unit employees will be paid the same pay and benefits henceforth in accordance with its order in Decision 79008. The Board will, therefore, consider the question of disproportionate pay for non-unit employees only in this decision.

The Board notes that, because of the changed nature of the complaint, the unfair labor practices complained of by the union, namely RSA 273-A:5, I (g), (h) & (i) are not entirely on point and will address only complaints under RSA 273-A:5, I (g) which makes it an unfair labor practice for a public employer "to fail to comply with this chapter or any rule adopted under this chapter; ..." In addition, the Board will consider whether the employer action complained of is also a violation of RSA 273-A:5, I (c) which makes it an unfair labor practice for a public employer "to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership and any employee organization; ..." The essence of the union's complaint in this case is that the city has provided pay and benefits to city employees who are not members of a bargaining unit represented by the union in greater amounts than those provided for bargaining unit employees and that there is no justification or reason for that action. The union alleges that this is a per se violation of the statute in that it is inherently violative of the rights of employees and is somehow a reward for employees who are not represented by the union and therefore is discriminatory against those who are represented by the union in certified bargaining units.

At the hearing the City Personnel Director, Wilbur Jenkins, provided testimony as to the reason for the disparate pay and benefits. He stated that there are many bargaining units in the City of Manchester, that the pay and benefits given to the bargaining unit employees for a two year contract exceeded those received by the non-bargaining unit employees in the first

year and that the 7.6 percent increase for the second year was an attempt to make up for the lower amount in the first year so that the two year total will be as equal as possible. Indeed he indicated that according to the calculations by the city, the non-bargaining unit employees would receive approximately one half of one percent less benefits than the bargaining unit employees for the two year period. He indicated as well that there was no purpose in setting the increased salary for non-bargaining unit employees other than to provide them with pay and benefits equal to others and there was no anti-union intent by the city.

Against this testimony, the union provided evidence that there had been disparate pay and benefits over a period of time, that the 7.6 percent increase was granted prior to the decision of this Board and that it was granted to non-union members within the bargaining units as well as that this indicated anti-union intent. In addition, the union witnesses stated that the total pay and benefits for the non-bargaining unit employees were higher than those for the bargaining unit members. This assertion was not supported by specific figures.

The Board finds that the action by the City prior to the decision in case 79008 would indeed have been an unfair labor practice violating RSA 273-A:5, I as charged. However, after our decision in that case, the city moved to correct its mistakes as found by the Board and the Board will not find any such unfair labor practice. However, as to non-bargaining unit employees, the Board must consider whether the granting of disparate pay and benefits to them for what was described essentially as equal work, is inherently unfair. The Board must consider whether intention of the employer is required to find such an unfair labor practice in these circumstances. The Board would state that there are certainly some circumstances in which action would be inherently unfair regardless of motive. Indeed, absent any explanation, the granting of different pay for the same work to bargaining unit employees and non-bargaining unit employees would seem to be such a case. There is, therefore, a presumption that if different pay in fact is granted to non-bargaining unit employees for the same work, the employer has violated RSA 273-A:5, I (c). When such a presumption has been established, it is the employer's duty and responsibility to provide an explanation for its actions. If no sufficient explanation is forthcoming, the unfair labor practice will have been sustained.

Applying that principle to this case, the union's complaint must fail for two reasons. First, the union failed to establish that the total pay and benefits of the employees over the two year period of the contract were substantially different. The city, on the other hand, explained that the differences were virtually wiped out when total pay and benefits for the two year period are considered. The only hard evidence before the Board was that provided by the city. Second, the explanation for the granting of the 7.6 percent pay increase for the second year to non-bargaining unit employees offered by the city, namely to bring into balance all pay and benefits over the two year period, added to the lack of substantiation of any anti-union intention, rebuts the presumption even if substantial differences had been shown.

Therefore, both because it was unable to demonstrate substantial differences in pay and because the Board finds the city had reason to take the action which it took to equalize pay and benefits for all city employees, the unfair labor practice, even as narrowed, cannot be sustained.

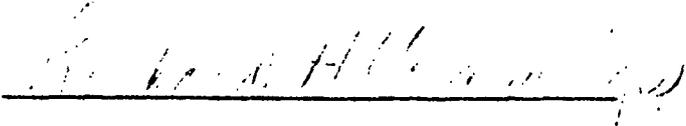
The Board would note that absent the special circumstances of this case, the city should take great care not to extend to non-bargaining unit employees performing the same work as bargaining unit employees pay and benefits which are disproportionate to those received by bargaining unit employees or it will subject itself to further accusations of this nature which it may not be able to explain.

ORDER

The Board issues the following order:

1. The unfair labor practice finding requested by the Manchester Municipal Employees Local 298 is denied because charges were not sustained at hearing.

Signed this 13th day of July, 1979



RICHARD H. CUMMINGS, ACTING CHAIRMAN
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Board members Moriarty and Mayhew also voting. All concurred. Board Clerk Evelyn LeBrun and Board Counsel Bradford Cook also present.